

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FEB 26 1959

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY,

Respondents

ON PETITIONS FOR REVIEW OF THE DECISIONS  
OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE COMMISSIONER

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 21,<sup>607</sup>~~067~~

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

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No. 21,607-A

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

D. CLIFFORD CRUMMEY and ETHEL ELIZABETH CRUMMEY,

Respondents

---

ON PETITIONS FOR REVIEW OF THE DECISIONS  
OF THE TAX COURT OF THE UNITED STATES

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BRIEF FOR THE COMMISSIONER

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 65-81)  
are not officially reported.

## JURISDICTION

The cross-petitions for review in this case involve deficiencies in gift taxes for the years 1962 and 1963 in the original total amount of \$3,857.54. On August 13, 1964, the Commissioner of Internal Revenue mailed notices of deficiencies to the taxpayers. (R. 5-8, 16-20.) Within ninety days thereafter, on September 25, 1964, the taxpayers filed timely petitions with the Tax Court for a redetermination of those deficiencies under Section 6213 of the Internal Revenue Code of 1954. (R. 1-3, 12-14.) The decisions of the Tax Court were entered on August 23, 1966. (R. 87, 93.) Taxpayers petitioned for review by this Court on November 10, 1966. (R. 96-100.) The Commissioner of Internal Revenue cross-petitioned for review by this Court on December 16, 1966. (R. 107-109.) Both taxpayers' petition and the Commissioner's cross-petition were filed within the three-month and four-month periods prescribed by Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

## QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that, in the absence of an appointed guardian, transfers in trust for the benefit of 11 and 15-year old minors were not present interests and therefore could not qualify for the gift tax exclusion of Section 2503(b), Internal Revenue Code of 1954, where the trust provided that minor beneficiaries could only demand a fixed amount of corpus through a guardian.

2. Whether the Tax Court erred in holding that under the same terms and circumstances of the above-mentioned trust, transfers for the benefit of a 20-year old minor were present interests and did qualify for the gift tax exclusion of Section 2503(b) of the 1954 Code.

#### STATUTES INVOLVED

The statutes are set out in the Appendix, infra.

#### STATEMENT

The facts found by the Tax Court (R. 66-70), all of which were stipulated, are as follows:

Taxpayers are husband and wife residing in San Francisco, California. They filed separate federal gift tax returns for the calendar years 1962 and 1963 with the District Director of Internal Revenue at San Francisco, California. (R. 66.)

On February 12, 1962, taxpayers executed, as grantors, an irrevocable inter vivos trust, for the benefit of their four children. Their names, dates of birth, and ages during the years in question are as follows (R. 66):

<u>Child</u>	<u>Birth Date</u>	<u>Age on 12/31/62</u>	<u>Age on 12/31/63</u>
John Knowles Crummev	February 1, 1940	22	23
Janet Sheldon Crummev	June 21, 1942	20	21
David Clarke Crummev	June 6, 1947	15	16
Mark Clifford Crummev	February 20, 1951	11	12

Paragraph "ONE" of the trust required the trustee to hold the property in equal shares for the children of the grantors. Paragraph

"TWO" stated that the trust agreement was to be irrevocable. (R. 66.)

Paragraph "THREE" read as follows (R. 67):

THREE. Additions. The Trustee may receive any other real or personal property from the Trustors (or either of them) or from any other person or persons, by lifetime gift, under a Will or Trust or from any other source. Such property will be held by the Trustee subject to the terms of this Agreement. A donor may designate or allocate all of his gift to one or more Trusts, or in stated amounts to different Trusts. If the donor does not specifically designate what amount of his gift is to augment each Trust, the Trustee shall divide such gift equally between the trusts then existing, established by this Agreement. The Trustee agrees, if he accepts such additions, to hold and manage such additions in trust for the uses and in the manner set forth herein. With respect to such additions, each child of the Trustors may demand at any time (up to and including December 31 of the year in which a transfer to his or her Trust has been made) the sum of Four Thousand Dollars (\$4,000.00) or the amount of the transfer from each donor, whichever is less, payable in cash immediately upon receipt by the Trustee of the demand in writing and in any event, not later than December 31 in the year in which such transfers was made. Such payment shall be made from the gift of that donor for that year. If a child is a minor at the time of such gift of that donor for that year, or fails in legal capacity for any reason, the child's guardian may make such demand on behalf of the child. The property received pursuant to the demand shall be held by the guardian for the benefit and use of the child.

Paragraph "FOUR" authorized the trustee, in his discretion, to distribute the trust income to each beneficiary until he attained the age of 21. The trustee was required to distribute trust income to each beneficiary, from age 21 to 35. When a beneficiary reached 35, the trustee was authorized, in his discretion, to distribute trust income to each beneficiary or his issue. (R. 67-68.) In addition, the trustee was authorized to invade the trust corpus of a beneficiary "up to the whole thereof" if the trustee, in his discretion, felt that the need of a beneficiary for his "proper care

maintenance, support and education" so required. Upon the death of a beneficiary, his share of the corpus was to go to his surviving issue; if he died without issue, then it was to be added equally to the trusts of the surviving children of the grantors. When each surviving issue of an original beneficiary reached the age of 25, the trustee was to distribute one-third of the principal in his trust to him; when he reached the age of 30, one-half of the remaining principal; and when he reached the age of 35, the remaining principal. (R. 68.)

Paragraph "FIVE" required the trustee, in exercising his discretionary authority under the trust, to consider any income a beneficiary received from sources outside the trust, including the legal duty and obligation of the grantors to support their children. Paragraph "EIGHT" named Robert F. Foster, trustee. Paragraph "NINE" incorporated a spendthrift provision into the trust prohibiting the trust beneficiaries from financially encumbering either the principal or income under their respective trusts. (R. 68.)

After an initial contribution of \$50, each taxpayer made the following additional transfers of property to the trust (R. 69):

<u>Date</u>	<u>Amount</u>
June 20, 1962	\$ 4,267.77
December 15, 1962	49,550.00
December 19, 1963	12,797.81
Total	<u>\$66,615.58</u>

During the years 1962 and 1963, the minor children of taxpayers lived with their parents who fully provided for their needs. During those years no beneficiary demanded any part of his trust property

nor were distributions made to any of the beneficiaries by the trustee. In addition, no legal guardian was appointed for any of taxpayers' minor children, either by the trust instrument or by a court of competent jurisdiction. (R. 69.)

In filing their federal gift tax returns for 1962 and 1963, taxpayers each claimed a \$3,000 gift tax exclusion for each of the four trust beneficiaries, constituting a total claimed exclusion by each taxpayer of \$24,000 for the two years in question. The Commissioner of Internal Revenue determined that each taxpayer was entitled to only one \$3,000 exclusion for 1962 and one \$3,000 exclusion for 1963 on the ground that the portion of the gifts in trust for the minor beneficiaries (those under 21) were "future interests" and therefore disallowed by the terms of Section 2503(b) of the 1954 Code. (R. 69-70.) In the proceedings below by way of stipulation, the Commissioner conceded that each taxpayer is entitled to an additional \$3,000 exclusion for 1963 on account of the fact that Janet Sheldon Crumney reached adult status (21 years of age) before the close of that year. (R. 30, 70.)

Taxpayers petitioned the Tax Court of the United States. (R. 1-3, 12-14.) On the basis of these evidentiary findings and the record in this case, the Tax Court sustained the deficiencies to the extent of \$2,477.72. (R. 87, 93.) The deficiencies as found by the Tax Court were based upon its holding that under the terms of the trust and the law of California, the gifts for the benefit of the two minor children were future interests and did not qualify for the gift tax exclusion. (R. 70, 81.) However, the Tax Court also held

that, despite the minority (20 years of age) of Janet Sheldon Crumney during 1962, the gifts for her benefit during that year were present interests which did qualify for the gift tax exclusion. (R. 73.)

From that action, taxpayers have prosecuted the instant petition for review (R. 96-100), and the Commissioner has prosecuted the instant cross-petition for review (R. 107-109).

#### SPECIFICATION OF ERROR RELIED UPON BY THE COMMISSIONER

The Tax Court erred in holding that, in the absence of an appointed guardian, transfers in trust for the benefit of a 20-year old minor were present interests and therefore could qualify for the gift tax exclusion of Section 2503(b), because the trust provided that minor beneficiaries could only demand a fixed amount of corpus through a guardian.

#### SUMMARY OF ARGUMENT

The Tax Court correctly held that transfers in trust for the benefit of 11 and 15 year old minors were not present interests to any extent, and therefore could not qualify for the gift tax exclusion of Section 2503(b) of the 1954 Code. Taxpayers created a trust for the benefit of their children. It provided that before the end of the year, each beneficiary could demand from the trustee the lesser of \$4,000 or the amount of the annual transfer. However, the trust further provided that if the beneficiary was a minor at the time of the gift, or failed in legal capacity for any reason, the beneficiary's guardian could make such demand for corpus upon the trustee. No guardian was appointed and none could reasonably be

expected to be appointed. Consequently, in the absence of an appointed guardian, the minor beneficiaries (aged 11 and 15) were not capable of making an effective demand upon the trustee. Moreover, even if the appointment of a guardian was not a prerequisite to the making of a demand under the trust instrument, these minor beneficiaries could not have made an effective demand upon the trustee under California law.

The Tax Court erroneously held that the transfers in trust for the benefit of the taxpayers' 20-year old daughter were present interests to the extent of the right to demand partial distribution of corpus. It is the Commissioner's contention that under the terms of the trust instrument and the relevant California law, the 20-year old daughter (a minor) suffered from the same legal incapacity as her 11 and 15-year old brothers. No guardian was appointed for her, and none could reasonably have been expected to be appointed. Moreover, she was not able to make an effective demand upon the trustee because of her minority status. The Tax Court's reliance upon a 20-year old's ability to make certain classes of contracts under California Civil Code, Section 33 was misplaced. Accordingly, the gifts in trust for the 20-year old's benefit were future interests, which do not qualify for the gift tax exclusion of Section 2503(b).

## ARGUMENT

### I

THE TAX COURT CORRECTLY HELD THAT IN THE ABSENCE OF AN APPOINTED GUARDIAN, TRANSFERS IN TRUST FOR THE BENEFIT OF 11 AND 15 YEAR OLD MINORS WERE NOT PRESENT INTERESTS AND THEREFORE COULD NOT QUALIFY FOR THE GIFT TAX EXCLUSION OF SECTION 2503(b), INTERNAL REVENUE CODE OF 1954, WHERE THE TRUST PROVIDED THAT MINOR BENEFICIARIES COULD ONLY DEMAND A FIXED AMOUNT OF CORPUS THROUGH A GUARDIAN

#### A. Introduction

Section 2503(b) of the Internal Revenue Code of 1954, Appendix, infra, excludes from taxable gifts the first \$3,000 of each gift made to any person, provided that such gifts are "other than gifts of future interests in property". The term "future interests" is defined in Treasury Regulations on Gift Tax (1954 Code), Section 25.2503-3(a), as follows:

"Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession or enjoyment at some future date or time.

This definition has been expressly approved by the Supreme Court in United States v. Pelzer, 312 U.S. 399; Ryerson v. United States, 312 U.S. 405; Fondren v. Commissioner, 324 U.S. 18; and Commissioner v. Disston, 325 U.S. 442.

Thus, in determining whether a gift is a present or future interest, the time of vesting of legal or equitable title is immaterial. The critical time is when enjoyment begins and the above-cited cases clearly indicate that the economic satisfaction which

the donee may derive from knowing that he will receive valuable property in the future is not the kind of present enjoyment which would make the gift one of a present interest.

The sole issue on taxpayers' petition for review is whether the transfers in trust for the benefit of two of their children (both minors age 11 and 15) were present interests within the meaning of Section 2503(b).<sup>1/</sup> The Tax Court concluded from an examination of the trust at issue that the transfers for the benefit of the 11 and 15 year old minor beneficiaries were future interests and therefore did not qualify for the gift tax exclusion of Section 2503(b). We contend that this result was correct and should be affirmed.

B. Neither the terms nor the surrounding circumstances of the trust executed by taxpayers conferred to any extent present interest in property upon the minor beneficiaries

In the instant case, an irrevocable trust was created by the taxpayers, wherein it was provided that each beneficiary could demand the lesser of his annual gift of corpus or \$4,000, if such demand was made before the end of the year in which such transfer was made. In this connection, the trust further stated (R. 67):

If a child is a minor at the time of such gift of that donor for that year, or fails in legal capacity for any reason, the child's guardian may make such demand on behalf of the child.

---

<sup>1/</sup> Taxpayers do not contend that the trust herein meets the requirements of Section 2503(c) of the 1954 Code. It is clear that the terms of the trust do not bring it within the purview of that section, as the Tax Court so held. (R. 72.)

Taxpayers entirely rely upon the alleged right of the beneficiaries to demand a portion of the annual transfers to the trust as conferring a present interest in the beneficiaries to the extent of this right. It is our contention that because the beneficiaries, aged 11 and 15, were minors under California law, they did not possess the legal capacity to make this demand. Moreover, under the above-quoted terms of the trust, they could only make such a demand through a guardian. In this respect, the record is clear that no guardian was appointed during the years at issue nor did any beneficiary demand any part of his trust property. (R. 69.) Hence, the beneficiaries' so-called right to demand partial distribution of the trust corpus was at no time during the years at issue exerciseable by anyone. It was at best an empty right. The very fact that this situation existed is an indication of the conditional nature of the gift. An interest whose enjoyment is dependent upon such future contingencies is, we submit, a future interest. It is not an interest limited to commence in enjoyment at the time the gift is made.

The instant case is in all material respects identical to that of Stifel v. Commissioner, 197 F. 2d 107 (C.A. 2d), affirming 17 T.C. 647. In Stifel, the trust provided that the minor beneficiary had "the right (which may be exercised during her minority by her general guardian, if any, or by any special guardian appointed for such purpose by a court of competent jurisdiction, but in no event by the settlor) at any time to terminate the trust" and thereby cause a distribution of corpus. (17 T.C. 647, 648). The Tax Court and the Second Circuit both held that this "right" did not make the

transfers present interests within the meaning of the gift tax, since none of the minor children could make a demand without a guardian and no guardian was appointed during the years involved. In reaching this result, the Second Circuit indicated that it was strongly influenced by these restrictions, although they did not expressly appear in the trust instrument, for it observed (197 F. 2d 107, 110):

It is urged that neither the Tax Court nor we may properly consider these items, since they involve restrictions not contained in the trust instrument. Cf. Kieckhefer v. Commissioner, 189 F. 2d 118, 122 (C.A. 7). But in Fondren v. Commissioner, 324 U.S. 18, 24 and Commissioner v. Disston, 325 U.S. 442, 449, the Supreme Court, in determining the nature of the rights conferred by the trust instruments, took account of "surrounding circumstances"; the Court, in reaching its determinations, did not lock itself inside the "four corners" of the writings but held that the key might lie outside. Were this not the rule, a donor could make gifts which on paper were 100% present but in practice were 100% future.

It must be further noted that in Commissioner v. Sharp, 153 F. 2d 163, this Court has adopted the same view of the relevant Supreme Court decisions, stating (p. 164) that "all the circumstances under which the gift was made" are to be considered.

Similarly, in the present case, the beneficiaries' right to demand partial distribution of corpus had no practical meaning. As in Stifel, the beneficiaries whose gifts are at issue were minors during the years in question, the terms of the trust provided that none of the minor children could demand partial distribution without a guardian, and no guardian was appointed. Taxpayers' failure to appoint a guardian, coupled with the other provisions of the trust which called for ultimate termination only after the death of

taxpayers' children (R. 67-68), establishes "surrounding circumstances" which clearly negative any inference that the demand clause of Paragraph "THREE" conferred any meaningful rights. Furthermore, the record indicates that the children had no need of the trust principal or income for their support, since they lived with their parents who fully provided for their needs during the years in question. (R. 69.) It is therefore evident that the right to demand any part of the corpus was not intended to be exercised during the years of the beneficiaries' minority, but only in the event of some radical change in existing circumstances, as a reversal in taxpayers' fortunes or the children attaining an age at which they could make some independent personal use of the money. This contingency was on the face of the record nonexistent during the years in issue, and there was no showing by taxpayers that it was likely to occur in the future, or at any rate during the beneficiaries' minority. Fondren v. Commissioner, supra, p. 24. As a practical matter, taxpayers controlled the application for appointment of a guardian. None was in fact appointed and taxpayers knew and intended that none should be applied for.

Taxpayers principally rely upon the decision in Kieckhefer v. Commissioner, 189 F. 2d 118 (C.A. 7th). (Br. 22-24.) We respectfully regard the Kieckhefer case as incorrectly decided by the Seventh Circuit and subscribe to the dissenting view of Judge Kerner (189 F. 2d 118, 122) and the opinion of the Tax Court in that case (15 T.C. 111). In considering only the terms of the trust as relevant and thereby ignoring the surrounding circumstances, the

Court of Appeals in Kieckhefer disregarded the rule as set forth by the Supreme Court in Fondren v. Commissioner, supra.

In any event, the instant trust more plainly than that in Kieckhefer confirms the fact that taxpayers intended that the children were not intended actually to have the immediate use, possession or enjoyment of principal under Paragraph "THREE" due to the short period of time they had to exercise their right of demand.<sup>2/</sup> Moreover, the ultimate right to the principal was not vested in taxpayers' children but in their issue; while in Kieckhefer, the entire trust estate was to be paid over to the beneficiary when he reached 21 years of age.<sup>3/</sup> Hence, under the language of Fondren, supra, pp. 20-21, there existed "the barrier of a substantial period between the will of the beneficiary or donee now to enjoy what has been given him and that enjoyment." Finally, the language of the instant trust differs markedly from that in Kieckhefer, in so far as in the present case the demand could only be made by a guardian if the beneficiary was a minor. The trust in Kieckhefer stated that the beneficiary "or the legally appointed guardian for his estate shall make due demand." (189 F. 2d 118, 120.) (Emphasis added.) Consequently, even if the Seventh Circuit's holding was

<sup>2/</sup> The demand had to be made before the end of the year in which the particular transfer was made. In each of the two years in issue, the transfers were made 16 and 12 days prior to the end of the year (R. 69), and there was no showing that the beneficiaries received notice of the transfers. Clearly, taxpayers by the mechanics of the trust and the manner in which it was implemented, did not intend the right of demand to be exercised.

<sup>3/</sup> In this respect, it is noteworthy that under the present law, the trust in Kieckhefer would have qualified under Section 2503(c) as a "Transfer for the Benefit of a Minor."

that a minor beneficiary could make an effective demand on corpus, its opinion does not control the disposition of the instant case, where the minor beneficiaries could only make a demand through a guardian. In this respect, the decision of the Tax Court below does not turn only on the disabilities of the beneficiaries under state law but also on the fact that no guardian was in fact appointed. Cf. Stifel v. Commissioner, supra. Clearly, each case must be decided in the light of its own trust instrument and surrounding circumstances. Commissioner v. Kempner, 126 F. 2d 853 (C.A. 5th). We contend that the absence of a guardian herein brings this case closer to the holding in Stifel v. Commissioner, supra.

In addition to the foregoing, it is submitted that contrary to the reasoning of Kieckhefer v. Commissioner, supra, pp. 121-122, a result, such as reached below, does not imply a holding that all gifts to minors are gifts of future interests under Section 2503(b). An outright gift to a minor or to the guardian of a minor or to any trust with the trustee under absolute duty to pay without restriction to or apply for the benefit of a minor has repeatedly been held to constitute a present interest under Section 2503(b) of the 1954 Code or its predecessor provision Section 1003(b) of the 1939 Code. Fisher v. Commissioner, 132 F. 2d 383 (C.A. 9th); Commissioner v. Sharp, supra; Roeser v. Commissioner, 2 T.C. 298, 304-305. Accordingly, the gift here is of a future interest, not merely because the beneficiaries were minors and the law or the trust required the appointment of a guardian in order to exercise the demand for

distribution of corpus. Rather, the other provisions of the trust evidence an intention of the taxpayers not to allow the appointment of a guardian (even if possible under state law) by controlling the time for demand of corpus. Furthermore, the long duration of the trust and its spendthrift provisions, with no contrary evidence in the record, establishes that taxpayers' children were not in fact to enjoy presently any part of the principal.

Taxpayers' reliance upon Gilmore v. Commissioner, 213 F. 2d 520 (C.A. 6th), reversing 20 T.C. 579, is similarly misplaced. (Br. 24-27.) The ground of the Sixth Circuit's reversal of the Tax Court was its belief that the trustee's discretionary power to invest the funds in non-income producing properties and to use the entire trust estate for the benefit of the beneficiaries did not render the transfers future interests. Contrary to the instant case, the trust in Gilmore, although for the benefit of minors, did not specify that demand for distribution could only be made through a guardian. Rather, both the Tax Court and the Sixth Circuit restricted their holdings upon an analysis of the trust provisions, and did not deal specifically with the problem in the instant case--the possible disability of the minor beneficiaries from making an effective demand. Any reliance which the Sixth Circuit may have placed upon Kieckhefer is merely dictum.

Finally, taxpayers also seek to derive comfort from the decision of the Tax Court in Perkins v. Commissioner, 27 T.C. 601. (Br. 27-29.) In that case, the court specifically noted that the right to demand income and principal was given to the adult parents of the

beneficiaries, the trust having been established by a grandfather of the beneficiaries. Consequently, the Tax Court was able to find that "there was at all times someone who could have made an effective, binding demand for principal and income." (27 T.C. 601, 605.) We submit that this effectively distinguishes Perkins from the instant case, where the minor beneficiaries could only make a demand through a guardian, and where no guardian was appointed during the years at issue. We therefore urge that this failure to appoint a guardian coupled with the other provisions of the trust brings the instant case under the rationale of Stifel v. Commissioner, supra. Because the 11 and 15 year old beneficiaries could not, and were not intended to, exercise their right of demand, the interests conferred upon them were future interests.

- C. The requirement of the appointment of a guardian vitiated the minor beneficiaries' right to demand under the trust instrument, because such appointment was a remote contingency under California law

Paragraph "THREE" of the trust at issue provided that if the beneficiary was a minor or failed in legal capacity for any reason, "the child's guardian may make such demand on behalf of the child." (R. 67.) Hence, we contend that the need for a guardian was intrinsic to the trust instrument if the beneficiary was a minor. Under such a reading, no inquiry of state law would be necessary because all of the beneficiaries at issue were clearly under 21 years of age and therefore minors under California law. California Civil Code, Section 25, Appendix, infra. Consequently, the absence of an appointment of a guardian during the years in question is most

relevant, as it rendered the beneficiaries' right to demand completely ineffective. Stifel v. Commissioner, supra, p. 110.<sup>4/</sup>

However, it is also noteworthy that under California law, the appointment of a guardian in the circumstances of the instant case would have been most unlikely.

The statutory authority for the appointment of guardians for minors is found in California, Probate Code Section 1440, Appendix, infra. The very language of Section 1440 makes it clear that there is no absolute right to an appointment of a guardian under it, because the statutory standard of "necessary or convenient" must be met before a court can appoint a guardian. In re Kentera's Guardianship, 41 Cal. 2d 639, 262 P. 2d 317; In re Harmon's Guardianship, 121 Cal. App. 2d 646, 263 P. 2d 649. Under the facts at bar, where taxpayers supported and housed all of their children during the years at issue (R. 69), there is no evidence to support the contention that the minor beneficiaries required the appointment of a guardian to protect their estates. Whatever interests the minor beneficiaries had in the trusts were well protected by the trust mechanism. Consequently, absent a serious reversal of taxpayers' financial state (a contingency which we contend is too hypothetical

<sup>4/</sup> We do not imply that the appointment of a guardian is always necessary in order to qualify a gift to a minor donee as a present interest. See Rev. Rul. 54-400, 1942-2 Cum. Bull. 319. However, in the instant case present ownership could only be secured by means of a guardian who was needed to perform certain legal tasks, such as the demand upon the trustee. See Rev. Rul. 54-91, 1954-1 Cum. Bull. 207. When the trustee himself holds the property in the capacity of a guardian, who can act without a demand upon him, there is no obstacle to present enjoyment of the transfers. Cf. United States v. Baker, 236 F. 2d 317 (C.A. 4th); Rev. Rul. 59-78, 1959-1 Cum. bull. 690.

to be properly considered), <sup>5/</sup> there is no doubt that the "necessary or convenient" standard of Section 1440 would not be met.

Taxpayers argue (Br. 14-16) that since the minor beneficiaries were over 14 years of age, <sup>6/</sup> they had the right to petition a court for the appointment of a guardian and thereby demand partial distribution of corpus from the trustee. We acknowledge that California Probate Code, Section 1440, grants the right of petition for appointment of a guardian to a minor over 14 years of age over the person or the estate. However, as in other guardianship cases, there must be an initial showing of necessity or convenience. In re Kentera's Guardianship, <sup>7/</sup> supra, p. 319.

Clearly, none of taxpayers' minor children would have been able to convince a court to establish a guardianship over their person, absent a showing that their parents were not treating them properly.

In re Guardianship of Rose, 171 Cal. App. 2d 677, 340 P. 2d 1045.

As stated by the Supreme Court of California in Kentera, supra, p.

319: "The statutory provisions were not intended to upset the normal

<sup>5/</sup> Taxpayers contend otherwise. (Br. 20.) However, the contingency of taxpayers' inability to support their children was plainly so remote on the record as to cause a "certainty of postponement" of enjoyment of the transfers within the meaning of Fondren v. Commissioner, supra, p. 26.

<sup>6/</sup> In this respect, it should be noted that Mark Clifford Crumney was born on February 20, 1951 (R. 66), and therefore did not attain the age of 14 during the years at issue.

<sup>7/</sup> This case involved guardianship over the person rather than over the estate. Consequently, the abstract quotation from it cited by taxpayers (Br. 15) is dictum. As we point out infra, the record in the instant case strongly negatives the possibility that taxpayers' minor children would be successful in planning the appointment of a guardian.

relationship of parent or child or to disrupt normal family discipline by allowing the fourteen-year-old minor to withdraw from the family circle at his whim." Furthermore, in order to secure a guardian over their estates, the minor children here would have had to show that their parents were incapable of supporting them or that the trust agreement was in some way depriving them of necessary funds. Such a petition is addressed to the discretion of the court. Cf.

In re Estate of Meiklejohn, 171 Cal. 247, 152 Pac. 734. It is highly doubtful, if not well nigh impossible, that a court would upset the clear intention of the taxpayers to create a trust of long duration. <sup>8/</sup>

Surely, the best interests and welfare of the Crummey children would not have required the appointment of a guardian upon their petition. <sup>9/</sup>

In re Reynolds' Guardianship, 60 Cal. App. 2d 669, 141 P. 2d 498;

In re Howard's Guardianship, 218 Cal. 607, 24 P. 2d 486. Taxpayers' attempt (Br. 16) to derive from the right of 14-year-old minors to appoint their own guardian the sufficient "degree of maturity" required to demand partial distribution of corpus upon the trustee is completely without foundation. The grant of a specific statutory

<sup>8/</sup> The right of taxpayers to dispose of property in the trust at issue should not under normal circumstances be infringed by the statutory right of a minor child to appoint his own guardian. Compare California Probate Code, Section 1406.5, Appendix, *infra*, with Section 1402. While taxpayers did not appoint a guardian under the trust, their disposition of the property to a trustee appears to be a right similar to that given by Section 1402.

<sup>9/</sup> Taxpayers also appear to argue (Br. 17-22) that they could have secured the appointment of a guardian for their children in their capacity as natural guardians. We do not believe that this would have been likely, absent a turn in their fortunes--a contingency too remote to be properly considered upon the present record. See fn. 6, *supra*. In addition, their failure to do so (even if such right existed) is relevant. Stifel v. Commissioner, *supra*, p. 110.

right under limited circumstances does not confer upon the class a general ability to exercise effectively other types of legal rights.

Finally, taxpayers urge (Br. 17-22) that taxpayers as parents, were the natural guardians of their minor children, and therefore had the right to make demand upon the trustee for partial distribution. What they overlook by this broad assertion is that a guardianship by nature is only of the person, and not of the estate of the child. Kendall v. Miller, 9 Cal. 591. It is well settled in California that a parent as such has no control over his child's property, California Civil Code, Section 202, Appendix, infra. Infancy does not incapacitate a person from owning property. In re Tetsubumi Yano's Estate, 188 Cal. 645, 649, 206 Pac. 995. See also Emery v. Emery, 45 Cal. 2d 421, 289 P. 2d 218. Consequently, taxpayers have admitted that they could not demand partial distribution of corpus from the trustee unless they were appointed legal guardians over the estate of their minor children by a court. (Br. 17-18.)<sup>10/</sup> We do not dispute the possibility suggested by taxpayers (Br. 20-22) that they, as natural guardians, might be appointed legal guardians by a court and demand portions of the corpus, holding such portions in a fiduciary capacity. However, absent any showing in the record that such a contingency was at all likely during the years in question in view of the requirements of California law, coupled with

10/ Contrary to taxpayers' assertions (Br. 19), California Probate Code, Sections 1430 and 1431, do not aid them. These provisions confer the mantle of legal guardianship upon parents over the estate of their minor children only when a small amount of property is involved, much less than in the instant case.

taxpayers' expressed intention to create a trust of long duration makes the possibility of this event too speculative to change what are clearly future interests into present interests.

Finally, taxpayers argue (Br. 31) that the Tax Court erred in denying their motion for a new trial (R. 94-95). This motion was made on the ground that taxpayers wished to introduce additional evidence to the effect that taxpayer D. Clifford Crummey had been appointed guardian of the person and estate of his minor children by a court of competent jurisdiction in 1951. Such a motion is addressed to the sound discretion of the court and taxpayers must show that the new evidence was not available to them at the time of the hearing. Bankers Coal Co. v. Burnet, 287 U.S. 308; Standard Knitting Mills v. Commissioner, 141 F. 2d 195 (C.A. 6th), certiorari denied, 322 U.S. 753; Sisto Financial Corp. v. Commissioner, 149 F. 2d 268 (C.A. 2d). The new evidence which taxpayers wish to submit involves proof of an event which allegedly occurred 14 years before trial. Clearly it was available to them at the time of the hearing. As the court stated in Goodman v. Commissioner, 200 F. 2d 681, 683 (C.A. 2d), "a failure to condone inexcusable neglect is not an abuse of discretion." In the light of the above, the Tax Court correctly denied taxpayers' motion for a new trial.

- D. Even if the minor beneficiaries could demand partial distribution of the trust corpus without the assistance of a guardian, such demand would not have been effective under California law

Although we have argued that under the trust the Crumney children, as minors, could not have made a demand for corpus without the appointment of a guardian, the Tax Court interpreted the terms of Paragraph "THREE" to mean that "if a minor beneficiary is not prohibited by state law from making his own demand, he had the right under the trust instrument to do so without the assistance of a guardian." (R. 73.) It thus adopted the position that the need for a guardian was intrinsic to the ability of the minor beneficiaries to make an effective demand under state law. However, it is our contention that even under such an interpretation of the trust, an examination of the relevant California law indicates that the Tax Court's holding was correct with respect to the minor beneficiaries, ages 11 and 15. Neither child could have made an effective demand under California law.

As we have already pointed out, supra, California Civil Code, Section 25, provides that minors are all persons under 21 years of age.<sup>11/</sup> Accordingly, minors are not capable of delegating power by appointing agents and are not capable of instituting suits in their own names, but only by a guardian; any contracts which they might enter into would be voidable and could be repudiated when they

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<sup>11/</sup> The only exception to this general rule is that married women over 18 are granted majority status. California Civil Code, Section 25.

reached their majority. California Civil Code, Sections 33, 35, 42 and 1556, Appendix, infra.<sup>12/</sup> Given the broad disability of David and Mark Crummey under California law, it can well be said that minors are presumed to be incapable of exercising a sound discretion over their affairs. Hence, the law presumes their acceptance of gifts which would be beneficial, although they have no direct knowledge of such gifts. De Levillain v. Evans, 39 Cal. 120. Hence, it is difficult to imagine that either minor beneficiary (aged 11 or 15) could have made an effective demand under Paragraph "THIRD" of the trust. In order for such a demand to be "effective", it would have had to be enforceable by the minor beneficiary. Plainly, their inability to sue in their own name without a guardian or to delegate authority strongly demonstrates that their right to demand was practically speaking merely a paper right, which if exercised, could not have been enforced. California Civil Code, Sections 33, 42; Keane v. Penha, 76 Cal. App. 2d 693, 173 P. 2d 835. Consequently, we maintain that the Tax Court's holding that neither David nor Mark Crummey could have made an effective demand of the trustee under California law was correct.

Taxpayers contend that the above stated disabilities are irrelevant and cite many cases for the proposition that minors are capable of owning property.<sup>13/</sup> (Br. 8-13.) We agree that minors have the right to own property and receive gifts, but that is not the issue

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<sup>12/</sup> Certain exceptions are made for the purchase of necessities, contracts for dramatic or athletic services, and obligations made pursuant to statute. See California Civil Code, Sections 36 and 37, Appendix, infra.

<sup>13/</sup> See e.g. Oyama v. California, 332 U.S. 633.

<sup>14/</sup>  
at bar. The question presented here is whether the 11 or 15-year old minors could effectively make a demand upon the trustee to effect partial distribution of the trust's corpus. In answering this question, the Tax Court correctly referred to the general disabilities of minors under California law.

Finally, we also submit that taxpayers' attempt (Br. 12-13) to draw support from several sections of the California Financial Code and Corporations Code avails them nothing. These provisions generally discharge banks and corporations who make payments to minors, either through withdrawal or dividends, respectively. In so providing, the California legislature recognized that a bank or a corporation should not be charged with notice that one of its account holders or stockholders is a minor. These statutes have thereby facilitated the relationship between minors and large financial institutions. If this were not the case, an impossible burden would be placed upon such institutions. However, the situation governed by these code provisions is entirely unlike the instant case. Firstly, the relationship between the minors and the trustee is not of the impersonal character as that between a minor and a bank. Secondly, a minor who has a bank account or a share of stock <sup>15/</sup> owns this property outright, and does not have to take

14/ In addition, contrary to taxpayers' assertions (Br. 9-10), the rights of minors to due process in juvenile court proceeding have no relevance to the issues presented here.

15/ It should be noted that gifts of stock to minors under 21 years old require a custodian pursuant to the Gifts of Securities to Minors Act, California Civil Code, Section 1154.

any legal steps to secure ownership. Plainly, withdrawal of funds from a bank does not secure ownership, for ownership is already present in the account holder. However, in the present case the minor beneficiaries could only secure ownership by an effective demand--a legal step they were incapable of taking under California law. This incapacity is plainly recognized by the trust instrument itself, which uses the phrase "If a child is a minor \*\*\* or fails in legal capacity for any reason." (R. 67.) (Emphasis added.)

Surely minority was regarded by the parties as one example of failure of legal capacity. In view of the above, we submit that the Tax Court's holding that the transfers to David and Mark Crumney were future interests was correct and should be affirmed.

## II

THE TAX COURT ERRED IN HOLDING THAT UNDER THE SAME TERMS AND CIRCUMSTANCES OF THE ABOVE-MENTIONED TRUST, TRANSFERS FOR THE BENEFIT OF A 20-YEAR OLD MINOR DID QUALIFY FOR THE GIFT TAX EXCLUSION OF SECTION 2503(b) OF THE 1954 CODE

Taxpayers' daughter, Janet Sheldon Crumney, was also a beneficiary of the trust in question. She was born on June 21, 1942 (R. 66), and was therefore 20 years old during the taxable year 1962. The Commissioner conceded below that taxpayers were each entitled to the gift tax exclusion for the transfers in trust for the benefit of their daughter for the year 1963 on account of the fact that she attained adult status before the end of that year. (R. 30, 70.) However, the Tax Court held that despite her minority (age 20) during 1962, the transfers in trust for her benefit were present interests and thereby qualified for the gift tax exclusion

of Section 2503(b) of the 1954 Code. It is this aspect of the Tax Court's holding that is the subject of the Commissioner's cross-petition for review.

The Tax Court's conclusion with respect to the gift to Janet Crumney rested entirely upon California Civil Code, Section 33. This provision allows a minor who has attained the age of 18 to "make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control." From this provision and the fact that a minor may also hold title to property, the Tax Court stated (R. 73):

Possessed of such broad rights under state law, and suffering from no legal disabilities brought to our attention, we hold that in 1962, when Janet Sheldon Crumney was 20, she could have effectively demanded \$4,000 from any and each total gift over that amount \*\*\*, that amount thereby constituting a present interest.

We believe that this aspect of the decision below represents an erroneous interpretation of California law and should be reversed.

It is our contention that the fact that a 20-year old can own property and make certain contracts does not answer the question at bar--whether a 20-year old could have effectively made a demand upon the trust in question. <sup>16/</sup> Firstly, as we have pointed out supra, we do not dispute the proposition that a minor can own property in

16/ For purposes of this argument, we will assume that the Tax Court's interpretation of the trust instrument was correct and that the appointment of a guardian was not a prerequisite for a minor beneficiary to make a demand. However, we continue to urge that the proper interpretation is as we have stated in Point I.B, supra. Under that argument, we urged that Janet Crumney's minority status coupled with lack of a guardian would have precluded an effective demand upon the trustee.

California, but we do not believe that this is relevant to the instant inquiry.<sup>17/</sup> Secondly, although a converse reading of Civil Code, Section 33, indicates that Janet Crumney could contract with respect to real property or to personal property not within her control, this does not imply, as the Tax Court stated, that she was "[P]ossessed of \*\*\* broad rights under state law." (R. 73.) However, the statutory scheme makes it eminently clear that except for the contracts under Civil Code, Sections 36 and 37, Appendix, infra, all contracts executed by a minor are voidable, unless they are specifically stated to be void by Civil Code, Section 33.<sup>18/</sup> Consequently, had Janet Crumney made such contracts, they would have been voidable, and subject to her privilege to disaffirm. California Civil Code, Sections 35-37.

Furthermore, we urge that all we have pointed out with respect to the disabilities of her two brothers in Point I, supra, applies to Janet Crumney as well. She was clearly a minor under the terms of Civil Code, Section 25, since she had reached the age of 21 during 1962, the year in question. Any demand she might have made upon the trustee could not have been enforced as a practical matter, since she lacked the capacity to sue in her own name without a guardian (Civil Code, Section 42), and any attempt by her to petition for

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<sup>17/</sup> It appears that a minor's right to own property is not at all conclusive, in view of the fact that the Tax Court's observation on this point would go to the two children who were below 18 as well.

<sup>18/</sup> Indeed, any delegation of authority is void with respect to all minors. California Civil Code, Section 33. Hence, none of the minor beneficiaries herein could have appointed an attorney to press their demands against the trustee. They could only proceed after the appointment of a guardian ad litem. Johnston v. Southern Pac. Co., 150 Cal. 535, 89 Pac. 348; In re Price, 61 Cal. App. 592, 215 Pac. 710

the appointment of a guardian would not, under the circumstances evidenced in the record, have met the "necessary or convenient" standard of Probate Code, Section 1410. As we have earlier stated, the possibility of changed circumstances which might have convinced a court to provide the necessary legal mechanics to distribute part of the corpus during the years in question is entirely too speculative to merit characterization of any of the instant transfers in trust as present interests.

In sum, we contend that Janet Crummey's capacity to enter into a certain class of contracts, otherwise void but which were voidable as to her because she was over 18, is not a pivotal distinction which compels the conclusion that she could have effectively demanded a partial distribution from the trustee. Her capacity in this regard is totally unrelated to her right to unilaterally demand partial distribution of corpus from the trustee under the terms of the trust, since such a demand is not even remotely connected with the liabilities and duties which arise under a contract between two parties as contemplated by Civil Code, Section 33. Consequently, it is submitted that she was in no better position vis-a-vis the trustee than her two brothers. None of them could make an effective demand upon the trustee. Accordingly, we urge that the Tax Court's holding that the transfers in trust to Janet Sheldon Crummey were present interests to the extent of \$4,000 is incorrect. Taxpayers are not entitled to a gift tax exclusion for the transfers made in her behalf for the year 1962.

CONCLUSION

For the reasons stated, the decisions of the Tax Court with respect to the claimed gift tax exclusions for the 11 and 15-year old minor beneficiaries are correct and should be affirmed. The decisions of the Tax Court with respect to the claimed gift tax exclusions for the 20-year old minor beneficiary are incorrect and should be reversed. This Court should hold that the transfers in trust to all of the minor beneficiaries were future interests, and as such, do not qualify for the gift tax exclusion.

Respectfully submitted,

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JULY, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: \_\_\_\_\_ day of July, 1967.

\_\_\_\_\_  
Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 2503. TAXABLE GIFTS.

\* \* \* \*

(b) Exclusions From Gifts.--In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1955 and subsequent calendar years, the first \$3,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property, the possibility that such interest may be diminished by the exercise of a power shall be disregarded in applying this subsection, if no part of such interest will at any time pass to any other person.

\* \* \* \*

(26 U.S.C. 1964 ed., Sec. 2503.)

Civil Code, 6 West's Annotated California Codes:

Sec. 25. Minors defined; exception of married females over 18; effect of annulment

Minors are all persons under 21 years of age; provided that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage, or who has contracted a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, or for the purpose of maintaining or defending an action affecting her marital status, the same as if she was 21 years of age.

Sec. 33. Minors; delegation of powers; incapacities while under age of 18

A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control.

Sec. 35. Minors; disaffirmance of contracts; restoration of consideration

In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent.

Sec. 36. Minors; contracts not disaffirmable

A contract, otherwise valid, entered into during minority, cannot be disaffirmed upon that ground either during the actual minority of the person entering into such contract, or at any time thereafter, in the following cases:

1. Necessaries. A contract to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them; provided, that these things have been actually furnished to him or to his family.

2. Particular services; judicial approval. A contract or agreement employing such person as, or wherein such person agrees to perform or render services as, an actor, actress, or other dramatic performer, or as a participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers and professional jockeys, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed. Such approval may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and said court shall have jurisdiction to approve, and its approval when

given shall extend to the whole of said contract or agreement, and all of the terms and provisions thereof, including, but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof.

Sec. 37. Minors; obligations not disaffirmable

Nor Certain Obligations. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute.

Sec. 42. Minors may enforce their rights; guardian

Minors May Enforce Their Rights. A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same.

Civil Code, 7 West's Annotated California Codes:

Sec. 202. Property of child; control

Parent Cannot Control The Property Of Child. The parent, as such, has no control over the property of the child.

Civil Code, 8 West's Annotated California Codes:

Sec. 1556. Persons capable of contracting

Who May Contract. All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

Probate Code, 54 West's Annotated California Codes:

Sec. 1402. Guardian of estate; appointment by will or deed

A parent may appoint a guardian by will or by deed for the property of any child of such parent, living or likely to be born, which such child may take from such parent by will or succession.

Sec. 1405. General guardian of minors or incompetents; appointment by court; multiple guardians; confirmation of appointments by will or deed

The superior court shall appoint a general guardian of the person and estate, or person or estate, of minors and insane or incompetent persons, whenever necessary or convenient, and when no guardian has been appointed for the purpose by will or by deed. The court, in its discretion, may appoint more than one guardian, each of whom must give a separate bond, and be governed and liable in all respects as a sole guardian. The court shall also confirm an appointment made by will or by deed, whenever requested, upon the same procedure and notice as in the case of appointment by the court.

Sec. 1406. Guardian of minor; rules for appointment

In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. If the child resides in this state and is over fourteen years of age, he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed if approved by the court. When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court.

Sec. 1406.5. Nomination by minor; restriction

The right of a minor to nominate a guardian is subject to the provisions of Section 1402 of this code.

Sec. 1440. Authority to appoint; petition; guardianship over more than one minor; bond

When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate. The appointment may be made upon the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age.

The court may issue letters of guardianship over the person or estate, or both, of more than one minor upon the same application, in its discretion. When there is an application for more than one minor, the court may permit a joint or separate bond in such multiple application.

